

STATE OF ALASKA

IBLA 79-302

Decided June 17, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, dismissing an earlier appeal as untimely.

Set aside and remanded.

1. Alaska: Land Grants and Selections: Generally --
Alaska: Native Allotments -- Appeals -- Contests and
Protests: Generally -- Rules of Practice: Government
Contests -- Rules of Practice: Private Contests

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for Allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the allotment issued, if all else be regular.

2. Alaska: Native Allotments -- Rules of Practice:
Appeals: Generally -- Rules of Practice: Appeals:
Notice of Appeal

Where, in a decision holding a Native allotment for approval and a State

selection for rejection to the extent of a conflict, the Bureau of Land Management grants the State 30 days to initiate a private contest challenging the Native allotment, the 30-day appeal period will commence upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision.

3. Alaska: Land Grants and Selections: Generally --
Alaska: Native Allotments -- Appeals -- Contest and
Protests: Generally -- Rules of Practice: Appeals:
Generally

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will be permitted a period of time in which to initiate a private contest or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

APPEARANCES: Barbara J. Miracle, Esq., Assistant Attorney General, State of Alaska, for State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing an appeal of an earlier BLM decision as untimely. The prior decision issued on December 6, 1978, held the Native allotment application AA-6242 of Winifred M. Alford, for approval and rejected State of Alaska selection application A-053268, to the extent that it conflicted with the Native allotment. ^{1/} BLM allowed the State 30 days from receipt of that decision to initiate a private contest pursuant to 43 CFR 4.450 challenging the Native allotment application. The decision stated that failure to initiate a private contest would "result in the Native

^{1/} The Native allotment application was filed pursuant to the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)). The State selections were made pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended, 48 U.S.C. Chap. 2 (1976).

allotment being approved and the State selection being rejected" to the extent of any conflict and that "[t]his action will become final without further notice." The decision also stated that the State of Alaska had the right to appeal to the Board of Land Appeals in accordance with Departmental regulations, 43 CFR 4.400.

The State interpreted the BLM decision to mean that it had 30 days to initiate a contest and, if it did not, the decision would become final triggering a 30-day appeal period as provided by the regulations. The State received the December 6, 1978, decision on December 8. BLM received the State's notice of appeal on January 30, 1979. By a notice dated February 2, 1979, BLM informed the State that its appeal was untimely and would not be considered. The notice indicated that the 30-day appeal period had run simultaneously with the contest period for the 30 days following the December 8 receipt of the BLM decision.

In the present appeal, received by BLM on March 9, 1979, the State challenged BLM's decision that its earlier appeal is untimely. The State charges that BLM has failed to follow this Board's ruling in John Nusunginya, 28 IBLA 83 (1970), thereby making it difficult for the State to review each allotment application and make a reasoned decision as to whether a BLM decision should be appealed. The State argues that the appeal procedure set forth in 43 CFR 4.411 is "highly unorthodox" in that the initial decisionmaker, BLM, may decide whether an appeal from its decision may be considered. Also the State contends that its interpretation that the 30-day appeal period ran subsequent to the 30-day contest period is correct.

[1] In recent decisions of the Board we have examined the BLM procedures for resolution of conflicts between Native allotment applications and State selection applications and set forth guidelines for appellate review by the Board. Specifically, in State of Alaska, 41 IBLA 309 (1979), we said that where such a conflict exists and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. The State may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings during the time prescribed to prove lack of qualifications on the part of the Native. If the State elects not to do so, it may inform BLM or simply allow the time to lapse, whereupon BLM will issue a decision concluding the adjudication. The State may appeal that decision to this Board in accordance with 43 CFR 4.400. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If it finds the allotment application acceptable, it will order the allotment issued if all else be regular.

[2] The Board has reviewed numerous cases where the BLM notice granted 30 days for initiation of a private contest and specified a

right to appeal to this Board. Where the State of Alaska filed notice of appeal after the running of 30 days but within the succeeding 30-day period, BLM, as it did in this case, dismissed the appeals as untimely. State of Alaska, 42 IBLA 94 (1979), we held that such dismissal was in error. The 30-day appeal period commenced upon expiration of the 30 days allowed the State for initiation of a private contest and not with the receipt of the BLM notice. Accordingly, the State's notice of appeal was timely filed.

[3] The appeal in this case was filed prior to the issuance of the decision in State of Alaska, 41 IBLA 309 (1979), wherein the Board delineated the election of remedies which the State must make and, therefore, the State was unaware that an election was mandatory. Accordingly, we will set aside the original decision and afford the State a period of 35 days from receipt of this decision in which to file a private contest complaint. At the expiration of 35 days, the decision of BLM will become final and the State may take a timely appeal to the Board directed solely to the question of whether a Government contest complaint should issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

